ABHAY SHRIDHAR AMBULKAR *a*

v.

S.V. BHAVE, COMMISSIONER OF POLICE & ORS.

SUPREME COURT INDIA
K JAGANNATHA SHETTY J
AM AHMADI J *b*
[WRIT PETITION (CRIMINAL) NO. 1248 OF 1990 WITH SLP (CRI) NO. 1407 OF 1990]
17 DECEMBER 1990

CONSTITUTIONAL LAW: *Habeas corpus - Res judicata - Dismissal of writ petition by High Court SLP and writ petition under art. 32 filed - New ground raised in the writ petition under art. 32 - Allowed to be raised - Practice and procedure - Articles 32, 136, 226.* *c*

PREVENTIVE DETENTION: *Detention order - Detaining authority - Delegation of power - Order conferring power on DM or Commissioner of Police of making detention order under s. 3(2) - Validity - Subjective satisfaction of government on existence of "circumstances prevailing or likely to prevail" - Essential precondition - Circumstances prevailing in praesenti - Period of exercise of the power - Date of the order - Future date - Then period of exercise of the power relatable to the apprehended circumstances - Government must apply its mind carefully to the circumstances - Order delegating the power merely reproducing language of subs. (3) permissible for government to link present circumstances with future by using 'and' - National Security Act 1980, s. 3(3).* *d*

Held:

[1] The power to make an order of detention primarily rests with the central government or the state government. However, subs. (3) of s. 3 of the National Security Act provides that the state government being satisfied with certain circumstances may order that the District Magistrate or the Commissioner of Police may also make an order of detention under subs. (2). The conferment of this power on the District Magistrate or the Commissioner of Police is not to the exclusion of but in addition to the powers of the government to exercise its own power. Subs. (3) refers to two independent circumstances namely: (i) the prevailing circumstances, (ii) the circumstances that are likely to prevail. The former means circumstances *in praesenti*, that is, prevalent on the date of the order and the latter means the anticipated circumstances in future. The period during which the District Magistrate or the Commissioner of Police, as the case may be, is to exercise the power provided by subs. (2) of s. 3 is to be specified in the order which would depend on the existence of circumstances *in praesenti* or at a future date. If the subjective satisfaction is based on circumstances prevailing at the date of the order, the choice of period, which must not exceed three months, would have to be determined from the date of the order. If the conferment of power is considered necessary because of circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances. Since very drastic powers of detention without trial are to be conferred on subordinate officers, the state government is expected to apply its mind and make a careful choice regarding the period during which such power shall be exercised by the subordinate officers, which would solely depend on the circumstances prevailing or likely to prevail. The subjective satisfaction cannot be lightly recorded by reproducing both the alternative clauses of the statute. The subjective satisfaction on the prevailing circumstances, or circumstances that are likely to prevail at a future date is the *sine qua non* for the exercise of power. The use of the word 'or' signifies *e* *f* *g* *h* *i*

either of the two situations for different periods. The power can of course be exercised for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail in future. The latter may stem from the former. But in that case the two circumstances would have to be joined by the conjunctive word 'and' not the disjunctive word 'or'. The use of the disjunctive word 'or' in the impugned government order only indicates non-application of mind and obscurity in thought. The obscurity in thought inexorably leads to obscurity in language. Hence the government order in the instant case has to be quashed.

[Writ Petition allowed.]

Legislation referred to:
Constitution of India [Ind], arts. 32, 136, 226
National Security Act 1980 [Ind], s. 3(2), (3)

[**Editor's Note:** This case was reported in the Supreme Court Cases [1991] 1 SCC 500 and is reproduced with the kind permission of the publishers.]

JUDGMENT

K Jagannatha Shetty J:

Abhay Sridhar Ambulkar-petitioner has been detained under the National Security Act 1980 (the Act). The order of detention dated 12 February 1990 was issued by the Commissioner of Police, Greater Bombay, who is respondent 1 in these cases. The order was issued under s. 3(2) of the Act with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order. The grounds of detention have been served to the petitioner along with the detention order. The petitioner challenged the validity of his detention in the High Court of Bombay by means of a writ petition under Article 226 of the Constitution. The High Court has dismissed the writ petition. Against the judgment of the High Court, Special Leave Petition (Cri.) No. 1407 of 1990 has been preferred. Simultaneously, the petitioner has filed Writ Petition (Cri.) No. 1248 of 1990 under Article 32 of the Constitution challenging the same order of detention by raising a new ground which has not been taken before the High Court.

We have heard Counsel for the petitioner, perused grounds of detention and the judgment of the High Court. The High Court has properly considered all the questions raised and we are in agreement with the conclusion reached by the High Court. The special leave petition is, therefore, rejected.

This takes us to the writ petition in which an additional question has been raised. The question relates to the validity of the government order dated 6 January 1990 pursuant to which the Commissioner of Police made the detention order. It would be convenient to set out that order hereunder:

Order

Dated 6 January 1990

59. National Security Act 1980

No. NSA-2390/1/SPL-3(B) - Whereas the Government of Maharashtra is satisfied that having regard to the circumstances prevailing or likely to prevail in the Greater Bombay Police Commissionerate, it is necessary that during the period commencing on 30 January 1990 and ending on 29 April 1990, the Commissioner of Police and the said Commissioner should also exercise the powers conferred by subs. (2) of s. 3 of the National Security Act 1980 (65 of 1980) (hereinafter referred to as "the said Act").

Now, therefore, in exercise of the powers conferred by subs. (3) of s. 3 of the said Act, the Government of Maharashtra hereby directs that for the period commencing on 30 January 1990 and ending on 29 April 1990 the Commissioner of Police, Greater Bombay may also if satisfied as provided in subs. (2) of s. 3 of the said Act exercise the powers conferred on the state government by subs. (2) of s. 3 of the said Act.

By order and in the name
of Governor of Maharashtra.

On 12 February 1990, the Commissioner of Police in exercise of the powers conferred by subs. (2) of s. 3 of the Act read with government order dated 6 January 1990, passed the order of detention which has been challenged in this case.

The essence of the attack of Counsel for the petitioner is that there was no valid conferment of power on the Commissioner to make the detention order. Counsel submitted that the government issued the order dated 6 January 1990 without applying its mind and it simply reproduces the wordings of subs. (3) of s. 3. The satisfaction of the government for conferring power on the Commissioner for the period in question purports to have been reached on the circumstances prevailing on the date of the order or likely to prevail during the three months period in question. The government was not certain which of the alternate circumstances was relevant for reaching the subjective satisfaction and seems to have acted in a mechanical manner without application of mind.

In order to appreciate these submissions it is necessary to set out s. 3, so far as material. It reads:

3. **Power to make orders detaining certain persons.**

(2) The central government or the state government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the state or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the state government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in subs. (2), exercise the powers conferred by the said subs.:

Provided that the period specified in an order made by the state government under this subs. shall not, in the first instance, exceed three months, but the state government may, if satisfied as aforesaid that it is necessary so to do, amend order to extend such period from time to time by any period not exceeding three months at any one time.

The power to make an order of detention primarily rests with the central government or the state government. The state government however, being satisfied with certain circumstances may order that the District Magistrate or the Commissioner of Police may also make an order of detention in respect of matters relating to the security of the state or public order or maintenance of supplies and services essential to the community against any person within their respective areas. The state government can make such an order which shall not in the first instance exceed three months but it may extend such period from time to time making fresh order for a further period again not exceeding three months at one time. It may be noted that the conferment of this power on the District Magistrate or the Commissioner of Police is not to the exclusion of but in addition to the powers of the government to exercise its own power.

The first paragraph of the order dated 6 January 1990 states that government was satisfied that having regard to the circumstances prevailing or likely to prevail in Greater Bombay Police Commissionerate it is necessary that during the period commencing on 30 January 1990 to 29 April 1990 the Commissioner should also exercise the powers conferred under subs. (2) of s. 3 of the Act. This is indeed no more than a reproduction of the terms of subs. (3) of s. 3. But subs. (3) refers to two in dependent circumstances namely: (i) the prevailing circumstances, (ii) the circumstances that are likely to prevail. The former evidently means circumstances *in praesenti* that is prevalent on the date of the order and the latter means the anticipated circumstances *in futuro*. If the government wants that the District Magistrate or the Commissioner of Police should also exercise the powers for the current period, it has to satisfy itself with the prevailing circumstances. If the government wants that the District Magistrate or the Commissioner of Police should also exercise the powers during the future period, it must be satisfied with the circumstances that are likely to prevail during that period. This seems to be the mandate of subs. (3).

The subjective satisfaction for the exercise of power under subs. (3) of s. 3 must be based on circumstances prevailing at the date of the order or likely to prevail at a future date. The period during which the District Magistrate or the Commissioner of Police, as the case may be, is to exercise the power provided by subs. (2) of s. 3 is to be specified in the order which would depend on the existence of circumstances *in praesenti* or at a future date. If the subjective satisfaction is based on circumstances prevailing at the date of the order, the choice of period, which must not exceed three months, would have to be determined from the date of the order. If the conferment of power is considered necessary because of circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances. Therefore, the specification of the period during which the District Magistrate or Commissioner of Police is to exercise power under subs. (2) of s. 3 would depend on the subjective satisfaction as to the existence of the circumstances *in praesenti* or *futuro*. Since very drastic powers of detention without trial are to be conferred on subordinate officers, the state government is expected to apply its mind and make a careful choice regarding the period during which such power shall be exercised by the subordinate officers, which would solely depend on the circumstances prevailing or likely to prevail. The subjective satisfaction cannot be lightly recorded by reproducing both the alternative clauses of the statute. The subjective satisfaction on the prevailing circumstances, or circumstances that are likely to prevail at a future date is the *sine qua non* for the exercise of power. The use of the word ‘or’ signifies either of the two situations for different periods. That, however, is not to say that the power cannot be exercised for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail in future. The latter may stem from the former. For example, there may be disturbances on the date of the order and the same situation may be visualised at a future date also in which case the power may be conferred on the subordinate officers keeping both the factors in mind; but in that case the two circumstances would have to be joined by the conjunctive word ‘and’ not the disjunctive word ‘or’. The use of the disjunctive word ‘or’ in the impugned government order only indicates non-application of mind and obscurity in thought. The obscurity in thought inexorably leads to obscurity in language. Apparently, the government seems to be uncertain as to the relevant circumstances to be taken into consideration, and that appears to be the reason why they have used the disjunctive word “or” in the impugned order.

In the result, we allow the writ petition, quash the government order dated 6 January 1990. Consequently, the detention order of the petitioner is also quashed as being without authority of law.

Also found at [1991] 3 CLJ 1681